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LIBERTY MUTUAL FIRE INSURANCE  
11 COMPANY

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA

14 LARGO CONCRETE, INC., a  
California Corporation; N.M.N.  
15 CONSTRUCTION, INC., a California  
Corporation,

16 Plaintiffs,

17 v.

18 LIBERTY MUTUAL FIRE  
19 INSURANCE COMPANY, a  
Massachusetts Corporation, and DOES  
20 1 through 100, inclusive.

21 Defendants.

Case No. C07-04651 CRB (ADR)

Hon. Charles R. Breyer  
[Complaint Filed: September 10, 2007]

**DECLARATION OF  
MELODEE YEE IN SUPPORT OF  
DEFENDANT AND  
COUNTERCLAIMANT LIBERTY  
MUTUAL FIRE INSURANCE  
COMPANY'S MOTION TO  
DISQUALIFY ROXBOROUGH,  
POMERANCE & NYE FROM  
REPRESENTING PLAINTIFFS**

Date: November 30, 2007  
Time: 10:00 a.m.  
Place: Courtroom 8

22  
23 AND RELATED COUNTERCLAIM  
24  
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**DECLARATION OF MELODEE YEE**

I, Melodee Yee, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I have personal knowledge of the facts set forth below and, if called and sworn as a witness, could and would testify competently thereto.

2. I am currently an attorney with Grace, Cosgrove & Schirm ("GCS"). Prior to my employment with GCS I practiced law with Kern & Wooley LLP. During my employment with Kern & Wooley the firm was coverage counsel for Liberty Mutual Fire Insurance Company and its affiliates (collectively the "Liberty Mutual companies"). A significant part of my legal practice during that time involved representing the Liberty Mutual companies in litigated and non-litigated matters, including insurance coverage disputes, "bad faith" claims and other related matters.

3. For a period of time, Craig S. Pynes and I were both associates at Kern & Wooley working in the practice group which represented the Liberty Mutual companies. I now understand that he practices with the firm of Roxborough, Pomerance & Nye (the "Roxborough firm") in Woodland Hills, California.

4. One of the cases in which Mr. Pynes and I represented the Liberty Mutual Companies was Tony's Fine Foods, Inc. v. Liberty Mutual Insurance Co., Alameda County Superior Court Case No. 2002067108, filed on October 1, 2002. A true and correct copy of plaintiff's complaint filed in the Tony's Fine Foods case is attached to this declaration as Exhibit A.

1           5. As discussed with the supervising attorney on the Tony's Fine  
2 Foods matter, Mr. Pynes was assigned a specific project to (i) review the Liberty  
3 Mutual companies' workers' compensation claim files, (ii) conduct a privilege  
4 review, (iii) make sure that any sensitive information was redacted, (iv) make a legal  
5 determination as to what documents were privileged, protected or otherwise immune  
6 from discovery, and (v) prepare a privilege log in that case. I discussed the  
7 assignment with Mr. Pynes before he began the project. At a later point in time I  
8 received a draft privilege log prepared by Mr. Pynes pursuant to this assignment.

9  
10           I declare under penalty of perjury, pursuant to the laws of the United  
11 States of America, that the foregoing is true and correct.

12           Executed this 22<sup>nd</sup> day of October 2007 at Los Angeles, California.  
13  
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16             
17           \_\_\_\_\_  
18           MELODEE YEE  
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## **EXHIBIT A**

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**FILED**  
ALAMEDA COUNTY

OCT 1 2002

CLERK OF THE SUPERIOR COURT

By [Signature] Deputy

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Attorney for Plaintiff,  
TONY'S FINE FOODS, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

[Unlimited Civil]

-00000-

2002067108

11 TONY'S FINE FOODS, INC., a California  
12 Corporation,

Plaintiff,

vs.

15 LIBERTY MUTUAL INSURANCE  
16 COMPANY, a Corporation, LIBERTY  
17 INSURANCE CORPORATION, a  
18 Corporation, ANDREA BURTON, and  
19 DOES 1 through 100, Inclusive,

Defendants.

CASE NO.

COMPLAINT FOR BREACH OF  
CONTRACT, BREACH OF THE DUTY  
OF GOOD FAITH AND FAIR  
DEALING, NEGLIGENCE,  
VIOLATION OF THE UNFAIR  
PRACTICES ACT (B&PC §17200, et  
sec.)

DEMAND FOR JURY TRIAL

**BY FAX**

21 COMES NOW, plaintiff TONY'S FINE FOODS, INC., (hereinafter "TONY'S"), and alleges as  
22 follows:

**INTRODUCTION**

24 1, That at all times herein mentioned, plaintiff TONY'S was a corporation duly organized  
25 and existing and doing business within the state of California.

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1 2. Plaintiff is informed and believes, and on that basis alleges, that defendant LIBERTY  
2 MUTUAL INSURANCE COMPANY and LIBERTY INSURANCE CORPORATION  
3 (hereinafter collectively referred to as "LIBERTY") at all times herein relevant were, and now are,  
4 corporations licensed to do business and actually doing business as insurers and issuing insurance  
5 Policies in the State of California, with its principal place of business in Boston, Massachusetts and  
6 Vermont, respectively.

7 3. Plaintiff is informed and believes, and on that basis alleges, that defendant ANDREA  
8 BURTON at all times herein relevant was, and now is, an employee of LIBERTY, and is a  
9 resident of Alameda County, State of California.

10 4. That the true names or capacities, whether individual, corporate, associate, or  
11 otherwise, of defendants named herein as DOES 1 through 100, inclusive, are unknown to plaintiff  
12 TONY'S at this time, who therefore sue said defendants by such fictitious names. TONY's is  
13 informed and believe and thereon allege that each of the defendants designated here as a DOE is  
14 legally responsible in some manner for the events and happenings herein referred to, and legally  
15 caused injury and damages proximately thereby to TONY's as herein alleged. Plaintiff will seek  
16 leave of this Court to amend this Complaint to insert their true names and capacities in place and  
17 instead of the fictitious names when the same become known to plaintiff.

18 5. That at all times herein mentioned, each and every defendant herein was the agent,  
19 servant, employee, partner, parent company, and/or joint venturer of the other defendants herein;  
20 that at all said times, each of said defendants was acting within the course and scope of said  
21 agency, service, employment, partnership, parent company, and joint venture.

#### 22 GENERAL ALLEGATIONS

23 6. From April 1, 1997 to April 1, 1999, in return for substantial premiums, LIBERTY,  
24 through their agent(s), located in California, sold TONY'S annual liability insurance policies which  
25 provided insurance coverage for, among other things, worker's compensation and employers  
26 liability, as defined in the policies. Said definitions include the following:

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## 1 PART ONE-WORKERS COMPENSATION INSURANCE

2 ... C. We will defend:

3 We have the right and duty to defend at our expense any claim, proceeding or suit against  
4 you for benefits payable by this insurance. We have the right to investigate and settle these  
5 claims, proceedings, or suits.

6 7. That at all times herein mentioned, LIBERTY, through its duly authorized agents,  
7 executed and delivered to TONY'S the following policies of insurance:

8 (a) Workers' Compensation and Employer's Liability policy No. WC7-161-038258-017  
9 (Exhibit A-Information Page) on which TONY'S FINE FOODS is the named insured and  
10 therefore qualifies as an insured; and,

11 (b) Workers' Compensation and Employer's Liability policy No. WC7-161-038258-018  
12 (Exhibit B-Information Page) on which TONY'S FINE FOODS is the named insured and  
13 therefore qualifies as an insured.

14 8. The policies were entered in to by LIBERTY and TONY'S and required payment of  
15 benefits for a total amount to be shown at the time of trial.

16 9. TONY'S has paid all premiums due under the policies to LIBERTY at all relevant times  
17 and has performed all required obligations under the policies.

18 10. That at all times mentioned, LIBERTY employed insurance adjustors, either  
19 independently or internally to assist defendants in the handling of the worker's compensation  
20 claims including the investigation into said claims, communicating with TONY's, and advising  
21 LIBERTY as to how the claims were being managed and processed, evaluated, and  
22 recommendations made; that at all times herein mentioned LIBERTY, its agents and employees,  
23 were acting in the course and scope of their agency and employment with defendants.

24 11. That at all relevant times, LIBERTY's conduct described herein was undertaken by the  
25 corporate officers or managing agents, identified herein as DOES 1 through 25, inclusive, who  
26 were responsible for advertising, underwriting, claims operation and management, communications

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1 and/or decisions, on behalf of said defendants. The conduct of said managing agents and  
2 individuals was undertaken on behalf of said defendants. LIBERTY had advance knowledge of the  
3 actions and conduct of said individuals and agents whose actions and conduct were ratified,  
4 authorized, and approved by managing agents and by other corporate officers, directors or  
5 managing agents whose precise identities are unknown to plaintiff at this time and are therefor  
6 identified and designated herein as DOES 1 through 25, inclusive.

7 12. That at all times mentioned, each of the defendants was an agent, employee, partner,  
8 or otherwise legally acting for the other defendants and was in the course and scope of their  
9 agency, employment, and partnership or legal relationship.

10 13. That at all times relevant to this action, there were in full force and effect certain  
11 Worker's Compensation Insurance Policies (hereinafter "POLICY") issued by LIBERTY to  
12 TONY's. A copy of the Information Page for the POLICY years 1997 and 1998 are attached  
13 hereto and incorporated herein by reference as Exhibits "A" and "B" respectively. The POLICY  
14 was entered into by TONY'S within the jurisdiction of the above entitled court and required the  
15 payment of benefits within the jurisdiction of the above entitled court for a total amount to be  
16 shown at the time of trial.

17 14. Said POLICY, among other things, insured risks associated with the filing of employee  
18 worker's compensation claims against TONY's and for employee benefit related losses thereto.  
19 Said POLICY imposed a duty on behalf of defendants, and each of them, to defend at defendant's  
20 expense any claim, proceeding or suit against TONY's and evaluate and conclude worker's  
21 compensation claims under the laws of the State of California, including, but not limited to  
22 appropriately managing the worker's compensation claims made by employees of TONY's.

23 15. During the period that LIBERTY handled TONY's claims for the years 1997 and  
24 1998, employees of TONY's made claims for worker's compensation benefits under the laws of  
25 the State of California, hereinafter collectively referred to as ("CLAIMS").

26 16. The POLICY was entered into by TONY's on or about April 1, 1997 and was  
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1 subsequently renewed in a timely manner. The POLICY remained in effect at all relevant times  
2 since its inception; all premiums due under the policy have been paid and all conditions on the part  
3 of TONY'S to be performed have been performed by them during the relevant periods of time as  
4 alleged herein

5 17. The defendants, and each of them, failed to properly manage and defend said CLAIMS  
6 during and subsequent to the policy periods.

7 18. In or about February 2001, TONY'S learned that a disproportionate amount of loss  
8 was assigned to the CLAIMS made against the POLICY resulting in damages to TONY'S,  
9 including an unreasonably high experience modification rate that was assigned to the CLAIMS  
10 submitted on behalf of TONY'S as well as an unreasonable increase in total reserves required  
11 under the POLICIES while managed by LIBERTY.

12 19. In or about February of 2001, TONY's learned that their total open reserves for  
13 CLAIMS made during the policy periods was approximately \$1,000,000.00. That TONY's  
14 learned that their year 2000 experienced modification rate exceeded the Cal/OSHA TICF  
15 assessment levels by almost 20% as a result of the alleged mishandling of CLAIMS for the 1997  
16 and 1998 years by the defendants, and each of them. That in or about April of 2001, TONY's  
17 received CLAIMS status reports from the defendants, and each of them, which indicated a failure  
18 to appropriately defend, failure to appropriately oversee the CLAIMS handling process, and a  
19 failure by the defendants, and each of them to manage appropriately the CLAIMS during the  
20 pendency of the CLAIMS and after April of 1999.

21 20. That as an example, with respect to three CLAIMS arising during the policy period  
22 years of 1997 and 1998, the total reserves increased by factors of 2.21, 2.75, and 13.8 respectively.  
23 That had the defendants, and each of them appropriately managed and defended said CLAIMS,  
24 TONY's year 2000 experience modification (as well as subsequent year experience modifications)  
25 would be well below the Cal/OSHA limit of 125%.

26 21. That as a result of the defendants, and each of their failure to appropriately manage  
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1 and defend said CLAIMS, Cal/OSHA TICF assessed a fine against TONY's pursuant to the Cal/  
2 OSHA TICF rules and regulations, notwithstanding the fact that TONY's safety program has  
3 improved dramatically since 1998. That TONY's experience modification rates have increased  
4 inordinately since the two policy terms have entered the experience rating system. That as a result  
5 of the defendants, and each of their neglect and failure to appropriately manage and defend said  
6 CLAIMS, TONY's has been added to Cal/OSHA's target list and assessed a fine. That as a  
7 further result of the neglect and failure by the defendants, and each of them to appropriately  
8 manage and control said CLAIMS, TONY's premiums have dramatically increased due in large  
9 part to excessive experience modifications as well as to the additional increase in the underwriting  
10 impact of loss ratios which have been falsely distorted due to the mishandling, neglect and failure  
11 by the defendants, and each of them to appropriately manage the CLAIMS made during the policy  
12 as well as subsequent thereto.

13 22. That on or about February of 2001 through June of 2001, TONY's made repeated  
14 requests to the defendants, and each of them for status updates and an explanation as to why  
15 TONY's modification rates were excessive and why the amount of reserves was needed to process  
16 such few CLAIMS that were made during the policy periods.

17 23. That on or about June of 2001, the defendants, and each of them set up a CLAIMS  
18 review session with TONY's for the purpose of explaining to TONY's the defendants position in  
19 processing CLAIMS and falsely leading TONY's to believe that said CLAIMS were appropriately  
20 handled and appropriately processed in full compliance under the California Worker's  
21 Compensation CLAIMS proceedings.

22 24. That on or about June of 2001 and thereafter, LIBERTY has failed to demonstrate and  
23 respond to TONY's request for a full evaluation of the CLAIMS being handled by LIBERTY to  
24 explain why TONY's modification rates and reserves are unreasonably disproportionate to the  
25 injured workers CLAIMS.

26 25. That at all times herein mentioned, LIBERTY failed to cause TONY's worker's  
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1 compensation CLAIMS to be timely managed, appropriately defended such that the CLAIMS  
2 were allowed to be unreasonably inflated exposing TONY's to higher modification rates and  
3 increased reserves all as a result of LIBERTY's failure to properly manage said CLAIMS.

4 26. As a result of the aforementioned acts and failures to act resulting in the increase in  
5 modification rates and increase in the company reserves from the CLAIMS, the plaintiffs were  
6 required to incur great expense in an effort to investigate the CLAIMS on their own in an attempt  
7 to correct the erroneous modification rates placed upon TONY's. Further, TONY's credit  
8 reputation was damaged in the community as a result of the unreasonably high reserves that were  
9 required to be set along with the penalties associated with an unreasonably high modification rate  
10 damaging TONY's credit and financial reputation in the industry.

11 27. That as a result of the failure by LIBERTY to appropriately manage and defend the  
12 worker's compensation CLAIMS made, agents and employees of LIBERTY agreed that under the  
13 terms of the POLICY that plaintiffs were entitled to compensation for the mishandling and  
14 inappropriate handling of the CLAIMS by LIBERTY; later defendant LIBERTY advised that they  
15 would not compensate TONY's for any damages associated with the mishandling of the CLAIMS  
16 and in fact, state now that the CLAIMS were handled appropriately and therefore no damages  
17 were incurred by TONY's as a result of any actions or inactions by LIBERTY.

18 28. That at all times herein mentioned, LIBERTY was required to manage and defend  
19 TONY's worker's compensation CLAIMS at least up to the standards in the industry for the  
20 management and defense of such CLAIMS and the failure to do so by LIBERTY has caused  
21 TONY's substantial loss as herein set forth.

22 29. That at all times herein mentioned, TONY's has been caused to incur and will continue  
23 to suffer consequential, incidental, out-of-pocket, and attorney expenses in a sum to be determined  
24 at the time of trial.

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## FIRST CAUSE OF ACTION

(Breach of Contract against LIBERTY, ANDREA BURTON and DOES 1 through 100)

30. Plaintiff hereby incorporates each and every paragraph of the general allegations as though fully set forth in this court.

31. That at all times mentioned, TONY's was insured by LIBERTY under their insurance POLICY, that the POLICY provided to pay coverage for worker's compensation CLAIMS and all management and defense of worker's compensation CLAIMS in accordance with the minimum standards in the State of California for defending worker's compensation CLAIMS, and other items of coverage.

32. That TONY's performed all the duties on their part to be performed under the insurance contract including the payment of premiums.

33. That on or about 1997 and 1998, TONY's employees suffered accidental injuries and CLAIMS and losses compensable under the terms of the POLICY in that the employees were injured on the job causing said employees to make CLAIMS for worker's compensation as provided for under the terms of the POLICY.

34. That TONY's promptly notified liberty of each of the employees CLAIMS under the POLICY and complied with all the terms and conditions of the policy including submitting any and all documents and forms requested by LIBERTY in connection with each of the CLAIMS made in 1997 and 1998.

35. On or about June of 2001, in response to TONY's request for information as to why the reserves had been set so high on the CLAIMS processed by LIBERTY, and as to why Cal/OSHA had penalized TONY's with respect to said CLAIMS, LIBERTY refuses and refused, and continues to deny that any CLAIMS mishandlings were involved at all leading to the increase in reserves and/or increase in modification rate as stated herein.

36. As a direct and proximate result of LIBERTY's breach of the subject insurance contract, by failing to appropriately defend and manage said worker's compensation CLAIMS,

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1 TONY's has suffered contractual damages under the POLICY and other incidental and  
2 consequential damages and expenses, all in a sum to be determined at the time of trial.

3 SECOND CAUSE OF ACTION

4 (Breach of the Duty of Good Faith and Fair Dealing

5 against LIBERTY, ANDREA BURTON and DOES 1 through 100)

6 As and for a separate and distinct Second Cause of Action, plaintiff complains against  
7 defendants LIBERTY, ANDREA BURTON, and DOES 1 through 100, inclusive, as follows.

8 37. TONY's hereby incorporate by reference all of the allegations set forth in the general  
9 allegations and the first count as though fully set forth herein.

10 38. The POLICIES created an implied covenant of good faith and fair dealing under which  
11 defendants undertook not to engage in any acts, conduct or omissions that would impair or  
12 diminish the rights and benefits due TONY'S under the POLICIES, and defendants, and each of  
13 them, tortuously breached the implied covenant of good faith and fair dealing by, among other  
14 things:

15 (a) engaging in the acts and omissions stated above;

16 (b) misstating the nature and extent of the insurance coverage available under the Policies;  
17 and, using improper and inapplicable standards and unduly restrictive interpretations of Policy  
18 language to deny or reduce available coverage;

19 (c) Unreasonably and in bad faith failing to appropriately defend the worker's  
20 compensation CLAIMS made by injured employees of TONY's for the calendar years 1997 and  
21 1998, and subsequent oversight thereafter, at the time when LIBERTY knew that the failure to so  
22 appropriately defend said worker's compensation CLAIMS would cause damage to TONY's in the  
23 form of unreasonable modification rates being and unreasonable reserves being required to be set  
24 for said CLAIMS;

25 (d) Unreasonably and in bad faith frustrating or withholding the appropriate services of  
26 employees of LIBERTY to appropriately defend the worker's compensation CLAIMS made

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1 against TONY's by its employees knowing all the while that TONY's losses were fully covered  
2 under the POLICY and applicable California Law;

3 (e) Unreasonably and in bad faith failing to employ or utilize the appropriate personnel in  
4 response to each and every CLAIM made by employees of TONY's for the calendar years 1997  
5 and 1998, and subsequent oversight thereafter, as required under the POLICY to moderate  
6 TONY's exposure under the CLAIMS;

7 (f) Unreasonably and in bad faith refusing to allow timely medical testing of the injured  
8 worker's medical condition knowing that the failure to do so would cause unreasonable and  
9 improper results to be reached with respect to ratings of each of the employees that made  
10 CLAIMS against TONY's and for benefits under the POLICY to be defended by LIBERTY.  
11 Further, unreasonably and in bad faith failing to obtain the appropriate personnel to defend the  
12 CLAIMS of the injured employees against TONY's so as to minimize TONY's exposure pursuant  
13 to the POLICY, thereby causing an increase in the reserves required to be set for the CLAIMS  
14 made during the calendar years 1997 and 1998, and subsequent oversight thereafter, and penalizing  
15 TONY's on their modification rate all causing damage to TONY's credit worthiness in the  
16 community;

17 (g) Unreasonably and in bad faith asserting that all CLAIMS submitted by TONY's for the  
18 calendar years 1997 and 1998, and subsequent oversight thereafter, were adequately worked up,  
19 defended and processed despite having no information or evidence to support said position in that  
20 the CLAIMS clearly were not defended and managed according to the minimum standards for  
21 defense of worker's compensation claims in the industry.

22 (h) Unreasonably and in bad faith failing to reasonably and timely investigate and defend  
23 and process the worker's compensation CLAIMS made against TONY's under the POLICY,  
24 failing to order testing, delaying authorization and necessary medical testing and treatment to  
25 defend injured employees CLAIMS as required at a minimum to appropriately defend and manage  
26 the worker's compensation CLAIMS on behalf of TONY's;

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(i) Unreasonably and in bad faith ignoring the standards and guidelines concerning the appropriate work up and defense of injured employee worker's compensation CLAIMS by failing to define the nature and scope of the injuries and the need for adequate containment of escalating worker's compensation expenses both during and after the POLICY period;

(j) Unreasonably and in bad faith misrepresenting to TONY's the California law applicable to the defense of the worker's compensation CLAIMS made for the calendar years 1997 and 1998 and subsequent management of said CLAIMS after April, 1999;

(k) Unreasonably and in bad faith failing to adhere to California worker's compensation law in what amounts to a *de facto* denial of benefits to TONY's under the terms of the POLICY;

(l) Unreasonably and in bad faith placing LIBERTY's interests ahead of TONY's interests in the handling of said CLAIMS and in failing to investigate and defend said CLAIMS at least as hard to support TONY's interests as LIBERTY did to support LIBERTY's interests.

(m) Unreasonably and in bad faith utilizing a scheme or process knowingly designed to maximize TONY's exposure under the CLAIMS while minimizing expense and cost to LIBERTY to enhance LIBERTY's profitability, as set forth in paragraphs 65, 66 and 69 which are incorporated by reference as if fully set forth herein.

39. The foregoing acts and omissions were engaged in with the knowledge that coverage and a duty to defend and indemnify TONY'S existed under the POLICY, and in conscious disregard of TONY'S rights under the POLICY.

40. As a direct and proximate result of the aforementioned conduct of defendants and each of them, plaintiff has been damaged in a sum in excess of the jurisdiction of this Court to be determined according to proof at trial of this matter.

41. TONY's is informed and believes and thereon alleges that LIBERTY has breached their duty of good faith and fair dealing owed to TONY's by other acts or omissions of which they are not presently aware; that TONY's reserves the right to amend this complaint to add further acts and omissions of the breach of the covenant of good faith and fair dealing subsequently

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1 discovered.

2 42. The acts alleged were part of defendants and each of their, ordinary business practice  
3 designed to keep from paying POLICY benefits which were and are legitimately owed to the  
4 plaintiff in order to increase the defendants' profits. In doing so, and in doing the acts set forth  
5 above, the defendants acted despicably, willfully, wantonly, oppressively, fraudulently and/or in  
6 conscious disregard of plaintiff's rights.

7 43. As a proximate result of the aforementioned wrongful conduct of LIBERTY, TONY'S  
8 has suffered and will continue to suffer in the future, damages as a result of not being paid  
9 POLICY benefits under the POLICY including interest in an amount according to proof at trial.

10 44. As further direct and proximate result of the aforementioned conduct of defendants and  
11 each of them, plaintiff has suffered other special damages in the amounts according to proof at the  
12 time of trial.

13 45. As a further and proximate result of the aforementioned wrongful conduct of  
14 LIBERTY, TONY'S has suffered and will continue to suffer anxiety, worry, mental and emotional  
15 distress, and other incidental damages and out of pocket expenses, all of which to the general  
16 damages of TONY's in a sum in excess of the jurisdictional minimum of this court and in a sum to  
17 be determined according to proof at the time of trial.

18 46. As a proximate result of the aforementioned wrongful business practices and conduct  
19 of LIBERTY, and its violation of its covenant good faith and fair dealing, TONY's has been  
20 compelled to retain legal counsel to obtain recovery for what amounts to a *de facto* denial of the  
21 benefits due under the POLICY. LIBERTY is liable to TONY'S for attorney fees actually  
22 incurred by TONY's to recover compensatory damages as a result of said denial of benefits under  
23 the POLICY in a sum to be determined according to proof at the time of trial.

24 47. LIBERTY's business practice and conduct described herein were intended by  
25 LIBERTY to cause injury to TONY's, was despicable conduct carried on by LIBERTY with  
26 willful and conscious disregard of the rights of its insured, subjecting TONY's to cruel and unusual

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1 hardship, and were intentional misrepresentations, deceit or concealment of material facts known  
2 to LIBERTY with the intent to deprive TONY's of their legal rights or otherwise cause injury; that  
3 such conduct constituted malice, oppression or fraud under California Civil Code Section 3294,  
4 thereby entitling TONY's to punitive damages in an amount appropriate to punish or set an  
5 example for defendants in a sum in excess of the jurisdictional minimum of this court.

6 WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as  
7 hereinafter set forth below.

### 8 THIRD CAUSE OF ACTION

9 (Negligence against LIBERTY, ANDREA BURTON and DOES 1 through 100)

10 As and for a separate and distinct Third Cause of Action, plaintiff complains against  
11 defendants LIBERTY, ANDREA BURTON, and DOES 1 through 100, inclusive as follows.

12 48. TONY's hereby incorporates by reference all of the allegations set forth in the general  
13 allegations and the first and second counts as though fully set forth herein, except paragraph 47.

14 49. At all relevant times, defendants knew that plaintiff would be relying upon the  
15 accuracy, competence, good faith and expertise of defendants, and each of them, in adjusting  
16 plaintiff's CLAIMS and in advising plaintiff of coverage under the POLICY, and so knew of the  
17 importance to plaintiff of performing competently and in compliance with the applicable standard  
18 of care, with respect to advising, handling, processing, and defending plaintiff's CLAIMS. As  
19 such, defendants were under a duty to TONY's to act competently, promptly and in the highest  
20 good faith in adjusting plaintiff's CLAIMS and in advising plaintiff as to coverage under the  
21 POLICIES.

22 50. That at all times mentioned, defendants, and each of them, breached their duties as set  
23 forth above, and were negligent and careless in performing the defense of the worker's  
24 compensation CLAIMS presented for the calendar years 1997 and 1998 and subsequent oversight  
25 thereto, by negligently defending TONY's interests and by negligently failing to perform necessary  
26 work/investigation to defend TONY's interest by negligently employing, utilizing, supervising, and

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1 or wrongfully transferring claims to disrupt continuity of handling by employees and adjustors of  
2 LIBERTY all to the damage of TONY'S in an amount that will be shown at the time of trial.  
3 51. That at all times mentioned, said defendants negligently and carelessly performed their  
4 work and services in connection with the defense of TONY's interest under the POLICY thereby  
5 causing an increase in reserves and penalties in the experience modification rates assigned to  
6 TONY's along with damage of TONY's credit worthiness.

7 52. TONY'S is informed and believes and thereon alleges that defendants, and each of  
8 them, have been negligent by other acts or omissions of which TONY'S is presently unaware and  
9 which will be shown according to proof at the time of trial.

10 53. As a direct and proximate result of the aforementioned conduct of defendants, and each  
11 of them, plaintiff has been damaged in a sum in excess of the jurisdiction of this Court to be  
12 determined according to proof at trial of this matter.

13 54. As a further direct and proximate result of the negligence of defendants, and each of  
14 them, TONY'S has sustained damages for the denial of indemnification benefits under the  
15 POLICY, plus interest, and other economic and consequential damages, for a total amount to be  
16 shown at the time of trial.

#### 17 FOURTH CAUSE OF ACTION

18 (Unfair Business Practice Against LIBERTY, ANDREA BURTON  
19 and DOES 1 through 100)

20 As and for a separate and distinct Fourth Cause of Action, plaintiff complains against  
21 defendants LIBERTY, ANDREA BURTON, and DOES 1 through 100, inclusive as follows.

22 55. TONY's hereby incorporates by reference all of the allegations set forth in the general  
23 allegations and the first, second and third counts as though fully set forth herein.

24 56. Defendants, and each of them, have committed acts of unfair competition as defined by  
25 Business and Professions Code sections 17200 et seq., by their conduct as follows:

26 Misleading and Fraudulent Advertising of the Workers' Compensation Policy

27 14

28 COMPLAINT FOR DAMAGES

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1 57. TONY'S is informed and believes and on that basis alleges that in 1997 through 1999,  
2 defendant LIBERTY was an insurance company or companies and that in order to maximize its  
3 own profits at the expense of consumers, developed, instituted and engaged in the sale of workers'  
4 compensation policies promising to provide comprehensive, complete and adequate liability  
5 insurance to California consumers and to market that insurance through its own or outside agents.  
6 LIBERTY and its agents marketed these policies so as to maximize potential profits while  
7 minimizing any actual liability of exposure by engaging in misleading and fraudulent advertising.

8 58. TONY'S is informed and believes and on that basis alleges that at the time LIBERTY  
9 developed and instituted this marketing plan, it intended to exaggerate the coverage promised  
10 while at the same time severely limiting the actual coverage provided.

11 59. Defendants, by their above-referenced conduct, have engaged in unlawful business  
12 practices with respect to TONY'S workers' compensation policies of insurance.

13 60. Plaintiff is informed and believes and on that basis alleges that the unlawful practices  
14 alleged above are continuing in nature and are widespread practices engaged in by defendants.

15 61. On behalf of the general public, TONY'S respectfully requests that the Court order that  
16 defendants be required to disgorge the profits they have wrongfully obtained through the use of  
17 these practices.

18 **Defendant Liberty's Improper Policy and Marketing Manipulations**

19 62. TONY's is informed and believes and thereon alleges that prior to the purchase of  
20 TONY's POLICY, LIBERTY implemented a false, fraudulent and unfair plan or scheme to limit  
21 its risk to paying claims while maximizing its profits. The scheme involved creating, printing and  
22 distributing, misleading and fraudulent advertising brochures and/or sales pitches through its agents  
23 and employees to sell the POLICIES to customers.

24 63. TONY's is informed and believes and thereon alleges that by implementing this  
25 scheme, LIBERTY has intended to reduce its losses on CLAIMS made under the POLICIES while  
26 significantly enhancing the profitability of the coverage for its own gain.

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1 67. As a result of LIBERTY's conduct, TONY's purchased the worker's compensation  
2 POLICY without receiving the full benefits therefrom. In addition, when employees of TONY's  
3 submitted CLAIMS for benefits under the POLICY, LIBERTY's conduct and actions had the  
4 effect of a denial of such coverage under the POLICY.

5 **Misleading and Fraudulent Advertising and Illusory Coverage of the Employer Liability**  
6 **Policy**

7 68. TONY's is informed and believes and thereon alleges that at least during the years  
8 1991 through 2001, defendant LIBERTY was an insurance company and that in order to maximize  
9 its own profits at the expense of consumers, developed, instituted and engaged in the sale of  
10 employer liability coverage POLICIES promising to provide comprehensive, complete and  
11 adequate worker's compensation liability insurance to California consumers and to market that  
12 insurance through its owns agents or through independent agents. That LIBERTY and its agents  
13 marketed this coverage so as to maximize potential profits when minimizing or eliminating any  
14 actual liability or exposure by engaging in misleading and fraudulent advertising and other unfair  
15 business practices as alleged herein and as will be shown at the time of trial.

16 69. TONY's is informed and believes and thereon alleges that at the time LIBERTY  
17 developed and instituted its marketing plan it intended to promise coverage while at the same time  
18 severely limiting or eliminating any actual exposure or liability through a calculated scheme of  
19 transferring files, hiring and firing claims adjustors and other delays for the purpose of minimizing  
20 its exposure or liability at TONY's and other consumer's expense, causing damage to TONY'S  
21 and other consumers in an amount that will be shown at the time of trial.

22 70. Defendants, and each of them, by their above referenced conduct, have engaged in  
23 unlawful business practices with respect to TONY's employer liability POLICIES of insurance.

24 71. TONY's is informed and believes and thereon alleges that the unlawful practices  
25 alleged above are continuing in nature and are widespread practices engaged in by the defendants.

26 72. On behalf of the general public, TONY's respectfully requests that an injunction  
27

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1 against defendants, and each of them, issue to enjoin them from continuing to engage in the  
2 unlawful conduct alleged herein.

3 73. On behalf of the general public, TONY's respectfully requests that the court order the  
4 defendants be required to disgorge the profits they have wrongfully obtained through the use of  
5 these unlawful practices.

6 74. TONY's respectfully requests an award of attorney fees upon prevailing in this request  
7 for injunctive relief.

8 WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

9 1. Damages for failure to provide the appropriate level of insurance to TONY's under the  
10 POLICY, plus interest, including prejudgment interest, in a sum to be determined at the time of  
11 trial;

12 2. General damages for mental and emotional distress and other incidental damages and  
13 out of pocket expenses in a sum in excess of the jurisdictional minimum of this court and according  
14 to proof at the time of trial;

15 3. With respect to the second count, punitive and exemplary damages in an amount  
16 appropriate to punish or set an example of defendants and others to not engage in similar conduct;

17 4. With respect to the fourth count, for a permanent injunction against defendants, and  
18 each of them, restraining, preventing and enjoining defendants from engaging in the illegal  
19 practices alleged and, for an order requiring defendants, and each of them, to disgorge the profits  
20 they wrongfully obtained through the use of their illegal practices.

21 5. For attorneys' fees reasonably incurred to obtain recovery of POLICY benefits and  
22 other damages as a result of defendants conduct according to proof;

23 6. For costs of suit incurred herein; and

24 7. For such other and further relief as the court deems just and proper.

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JURY DEMAND

Plaintiff demands a trial by jury on all issues in this action.

LAW OFFICE OF ANDREW E. BAKOS

Dated: 9-30-02



Andrew E. Bakos  
Attorney for Plaintiff  
TONY'S FINE FOODS, INC.

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ISSUED PLEASANTON INFORMATION PAGE

LIBERTY  
MUTUAL

Workers Compensation and  
Employers Liability Policy

ACCOUNT NO. 03 82 58	SUB ACCT NO. 0000	Liberty Mutual Insurance Group/Boston LIBERTY INSURANCE CORPORATION 21814			
POLICY NO. WC7-161-038258-017	TD/CD 92/4	SALES OFFICE SACRAMENTO	CODE 608	SALES REPRESENTATIVE NAGLER	CODE N/R 1ST YEAR R 7744 1 97

Item 1. Name of TONY'S FINE FOODS  
Insured 3575 REED AVE  
WEST SACRAMENTO, CA 95605  
Address

FEIN 941583721

Status CORPORATION

Other workplaces not shown above:

Item 2. Policy Period: From Mo. Day Year to Mo. Day Year  
12:01 AM 04 01 97 to 04 01 98  
standard time at the address of the insured as stated herein.

Item 3. Coverage

A. Workers Compensation Insurance: Part One of the policy applies to the Workers Compensation Law of the states listed here:

CA #2

B. Employers Liability Insurance: Part Two of the policy applies to work in each state listed in item 3A. The limits of our liability under Part Two are:

Bodily Injury by Accident \$ 1,000,000 each accident  
Bodily Injury by Disease \$ 1,000,000 policy limit  
Bodily Injury by Disease \$ 1,000,000 each employee

C. Other States Insurance: Part Three of the policy applies to the states, if any, listed here:

ALL STATES EXCEPT THOSE LISTED IN ITEM 3A AND THE STATES OF  
ND NV OH WA WV WY AK

D. This policy includes these endorsements and schedules: SEE EXTENSION OF INFORMATION PAGE

Item 4. Premium — The premium for this policy will be determined by our Manuals of Rules, Classifications, Rates and Rating Plans. All information required below is subject to verification and change by audit.

Classifications	Code No.	Premium Basis Estimated Total Annual Premium	Rate Per \$100 of Rev in operation	Line Estimated Annual Premium
SEE EXTENSION OF INFORMATION PAGE				110
CA WC ADMIN SURCHARGE \$	209			
CA FRAUD SURCHARGE \$	356			
Minimum Premium \$ 757 (CA)		Total Estimated Annual Premium \$		108,117
Interim adjustment of premium shall be made: ANNUALLY		Deposit Premium \$		108,117

\*N\*4N00\* SCPP

This policy, including all endorsements issued therewith, is hereby countersigned by

Authorized Representative Date 09/01/97

Loc. Code	Term. Oper.	Eff. Date	Periodic Payment	Rating Basis	Pol. H.C.	Home State	Division
1	04/08/97	1		NR		CA	NEW

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EXH "A"



ISSUED PLEASANTON  
INFORMATION PAGE

LIBERTY  
MUTUAL

Workers Compensation and  
Employers Liability Policy

LIBERTY Mutual Insurance Group/Boston  
LIBERTY INSURANCE CORPORATION 21834

ACCOUNT NO. 03 82 58	SUB ACCT NO. 0000	POLICY NO. WC7-161-038258-018		TD/CD 92/2	SALES OFFICE SACRAMENTO	CODE 608	SALES REPRESENTATIVE NAGLER	CODE R	N/R 7744	1ST YEAR 2	97
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Item 1. Name of TONY'S FINE FOODS  
Insured 3575 REED AVE  
WEST SACRAMENTO, CA 95605  
Address  
Status CORPORATION  
Other workplaces not shown above: SEE ITEM FOUR  
FEIN 941583721

Item 2. Policy Period: From 04 01 98 to 04 01 99  
12:01 AM standard time at the address of the insured as stated herein.

## Item 3. Coverage

- A. Workers Compensation Insurance: Part One of the policy applies to the Workers Compensation Law of the states listed here:  
AZ CA UT
- B. Employers Liability Insurance: Part Two of the policy applies to work in each state listed in item 3.A. The limits of our liability under Part Two are:  
Bodily Injury by Accident \$ 1,000,000 each accident  
Bodily Injury by Disease \$ 1,000,000 policy limit  
Bodily Injury by Disease \$ 1,000,000 each employee
- C. Other States Insurance: Part Three of the policy applies to the states, if any, listed here:  
ALL STATES EXCEPT THOSE LISTED IN ITEM 3A AND THE STATES OF  
ND NV OH WA WV WY AK
- D. This policy includes these endorsements and schedules: SEE EXTENSION OF INFORMATION PAGE

Item 4. Premium — The premium for this policy will be determined by our Manuals of Rules, Classifications, Rates and Rating Plans. All information required below is subject to verification and change by audit.

Classifications	Code No.	Premium Basis Estimated Total Annual Reimbursement	Rate Per \$100 of Re- imbursement	LINE 110 Estimated Annual Premiums
SEE EXTENSION OF INFORMATION PAGE				
CA WC ADMIN SURCHARGE \$	232			
CA FRAUD SURCHARGE \$	376			
Minimum Premium \$ 719 (CA)		Total Estimated Annual Premium \$		131,659
Interim adjustment of premium shall be made: ANNUALLY		Deposit Premium \$		131,659

\*N4N00\* SCPP

This policy, including all endorsements issued therewith, is hereby countersigned by

Authorized Representative Date

Loc. Code	Term. Oper. MAY	Ann. Date	Periodic Payment	Rating Basis	Pol. N.G.	Name State	Divisions	RENEWAL OF
1	04/07/98	1		NR		CA		WC7-161-038258-017

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Exh "D"



1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles; I am over the age of eighteen  
4 years and not a party to the within entitled action; my business address is 333 South Hope  
Street, 48th Floor, Los Angeles, California 90071-1448.

5 On **October 23, 2007**, I served the following document(s) described as  
6 **DECLARATION OF MELODEE YEE IN SUPPORT OF DEFENDANT AND**  
7 **COUNTERCLAIMANT LIBERTY MUTUAL FIRE INSURANCE COMPANY'S**  
8 **MOTION TO DISQUALIFY ROXBOROUGH, POMERANCE & NYE FROM**  
9 **REPRESENTING PLAINTIFFS** on the interested party(ies) in this action by placing  
true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

10 Nicholas P. Roxborough, Esq.  
11 Michael L. Phillips, Esq.  
12 Roxborough, Pomerance & Nye LLP  
13 5820 Canoga Ave., Suite 250  
14 Woodland Hills, CA 91367

- 15 ☒ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and  
16 processing correspondence for mailing. Under that practice it would be deposited  
17 with the U.S. postal service on that same day with postage thereon fully prepaid at  
18 Los Angeles, California in the ordinary course of business. I am aware that on  
19 motion of the party served, service is presumed invalid if postal cancellation date or  
20 postage meter date is more than one day after date of deposit for mailing in  
affidavit.
- 21 ☐ **BY OVERNIGHT DELIVERY:** I served such envelope or package to be  
22 delivered on the same day to an authorized courier or driver authorized by the  
23 overnight service carrier to receive documents, in an envelope or package  
24 designated by the overnight service carrier.
- 25 ☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of  
26 this Court at whose direction the service was made. I declare under penalty of  
27 perjury under the laws of the United States of America that the foregoing is true and  
28 correct.

Executed on **October 23, 2007**, at Los Angeles, California.

21   
22  
23 ANDREA J. HERNANDEZ